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Nos. 80-1012, 80-1030 and 80-1052

IN THE

Supreme Court of the United States

October Term, 1981

WINE & SPIRITS WHOLESALERS OF CALIFORNIA, a California corporation,

Petitioner,

vs.

NORMAN WILLIAMS COMPANY, etc., *et al.*,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California Third Appellate District

BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052

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Questions Presented for Review.

This case presents for review the following questions relating to the validity of a California statute (CAL. BUS. & PROF. CODE § 23672 (West 1981)) which limits the persons who may purchase or accept delivery of a brand of distilled spirits to those licensed importers who have been designated by the brand owner or his agent:

1. Whether the California statute, *on its face*, compels or authorizes a *per se* violation of the Sherman Act and is therefore preempted under the Supremacy Clause even though the statute does no more than facilitate a brand owner's vertical allocation of the California wholesale market for branded distilled spirits;

2. Whether the Twenty-first Amendment to the United States Constitution validates the California statute and precludes its preemption by the Sherman Act and the Commerce Clause;

3. Whether in determining the validity, under the Sherman Act, of a state statute concededly enacted to effectuate a clearly articulated state policy, the state action exemption may be held inapplicable notwithstanding that the statute has not become effective and the state has not been afforded an opportunity to actively supervise the statutory scheme; and

4. Whether the Commerce Clause preempts the California Statute even though it does not discriminate against interstate commerce and there is no evidence that it will burden or unduly restrict the overall flow of interstate commerce.

Parties.

Petitioners herein are:

1. Baxter Rice, Director, Department of Alcoholic Beverage Control, respondent below;

2. Wine & Spirits Wholesalers of California, a California corporation, an intervenor below; and

3. Bohemian Distributing Company, a California corporation, an intervenor below.

Respondents herein, petitioners below, are Norman Williams Company, a California corporation; Schwab Distributing Company, Inc., a California corporation d/b/a/ Gold Coast Wines & Spirits; Lewis Westco & Co., a California corporation; Greene Cat Liquors, Inc., a California corporation; Frederica Auldridge d/b/a South Bay Liquor; Ralph E. Pierce and Sharon L. Pierce d/b/a/ Texas Liquor House; and William A. Kirby, Jr. and Shirley D. Kirby d/b/a/ House of Fine Spirits.

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Respondents.

BRIEF OF PETITIONER WINE & SPIRITS WHOLESALERS OF CALIFORNIA IN CASE NO. 80-1052.

Opinion Below.

The Opinion of the California Court of Appeal, Third Appellate District, is officially reported as *Norman Williams Co. v. Rice,* 108 Cal. App. 3d 348 (1980). (P.A. *A* 1-17.)[1]

Jurisdiction.

The judgment of the California Court of Appeal was entered on July 17, 1980 and is set forth in that court's Opinion. (P.A. *A* 16-17.) A timely Petition for Hearing, filed by Wine & Spirits Wholesalers Association of Cali-

[1]The Appendices to Petition No. 80-1052 are cited in this Brief as "P.A." and the Joint Appendix filed herein is cited as "J.A." Record documents which are not contained in an appendix are cited as "R." with a description of the document.

fornia in the California Supreme Court, was denied by that court on September 24, 1980. (P.A. *B* 18.)

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Constitutional and Statutory Provisions.

This case involves the following constitutional and statutory provisions, which provide in relevant part:

U.S. CONST. art. I, § 8, cl. 3 (Commerce Clause):

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States. . . .

U.S. CONST. art. VI, cl. 2 (Supremacy Clause):

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstandng.

U.S. CONST., amend. XXI, § 2:

> The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited.

Sherman Act § 1, 15 U.S.C. § 1 (1981):

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

CAL. BUS. & PROF. CODE § 23672 (West 1981), as amended by Assembly Bill No. 499 (Stats. 1979, ch. 208, § 1):

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is

> designated as an authorized importer of such brand by the brand owner or his authorized agent. Such distilled spirits imported into California shall come to rest at the warehouse of the licensed importer or an authorized warehouse for the account of such licensed importer, before sale and delivery to a retail licensee.

Pertinent provisions of Oklahoma law are quoted in the Appendices to Petition No. 80-1052. (P.A. *C* 19-20.)

Statement.

This case was maintained by petitioners below as an original writ proceeding in the California Court of Appeal, Third Appellate District, to adjudicate the validity of California Business & Professions Code section 23672 (West 1981), as amended by Assembly Bill No. 499 (Cal. Stats. 1979, ch. 208, § 1) (the "Designation Statute"). In pertinent part, the Designation Statute, as amended, provides:

> A licensed importer shall not purchase or accept delivery of any brand of distilled spirits unless he is designated as an authorized importer of such brand by the brand owner or his authorized agent.[2]

Petitioners below are three California importer-wholesalers[3] of distilled spirits and four of their retail customers. Respondent below is Baxter Rice, Director of the California Department of Alcoholic Beverage Control. Wine & Spirits Wholesalers of California ("Wholesalers Association"), a statewide association of licensed importers and wholesalers of distilled spirits, and Bohemian Distributing Company, a California importer-wholesaler, were granted leave to in-

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[2]The validity of the last sentence of the Designation Statute, which requires that imported distilled spirits "come to rest" at the importer's warehouse, was not challenged by petitioners below and is not an issue in this case. (P.A. *A* 16.)

[3]Pursuant to California Business & Professions Code section 23775 (West 1964), a licensed importer must also hold a California wholesaler's license.

tervene for purposes of defending against claims asserted by petitioners below. (J.A. 2.)

By an amended petition for writ of mandate filed on November 20, 1979, petitioners below alleged, among other things, that the Designation Statute "is inconsistent with and preempted by the Federal antitrust laws. . . ." Petitioners below expressly limited their challenge to the validity of the Statute on its face and disclaimed the necessity of a trial on the facts. (J.A 25.) On December 31, 1979, one day prior to the effective date of Assembly Bill No. 499, the California Court of Appeal issued an alternative writ and stayed the enforcement of the Designation Statute, pending resolution of the case on its merits. (J.A. 74-77.) The court ultimately struck down the statute, resting its final decision exclusively on federal grounds. In its Opinion, the Court of Appeal ruled that the Designation Statute was invalid because it purportedly was in "direct contravention of the express terms of the Commerce Clause and the Sherman Act."[4] (P.A. *A* 10.) Consistently with the issues framed by the Amended Petition, the lower court based its determination solely on the facial validity of the Designation Statute and declined to consider any evidentiary material presented by petitioners below. (P.A. *A* 2 n.1.)

A timely Petition for Hearing filed in the California Supreme Court was denied without opinion on September 24, 1980. (P.A. *B* 18.) On the following day, the Court of Appeal issued a peremptory writ of mandate permanently enjoining enforcement of the Designation Statute. (P.A. *D* 21.)

The Designation Statute is an integral part of California's Alcoholic Beverage Control Act. (J.A. 52.) Originally enacted in 1933, when the Eighteenth Amendment to the

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[4]In proceedings before the Court of Appeal, the parties did not address the question whether the Commerce Clause invalidated the Designation Statute. The issue was raised *sua sponte* by the court in its opinion.

United States Constitution was repealed, the Act is a comprehensive statutory scheme for regulating the importation, distribution and sale of distilled spirits. *See* CAL. BUS. & PROF. CODE § 23000 *et seq.* (West 1964); *Sandelin v. Collins*, 1 Cal. 2d 147, 152, 33 P.2d 1009 (1934). The vast majority of distilled spirits consumed in California is imported from sources outside the State, and the great bulk of imported distilled spirits consists of brands owned by distillers and other primary sources of supply. (*See* J.A. 16; R. — Declaration of Sante Quattrin in Support of Application of Wine & Spirits Wholesalers of California for leave to Intervene and to File Complaint in Intervention ("Quattrin Declaration") at A-2, A-13, filed on Nov. 29, 1979. (J.A. 2.) Historically, California's system of liquor distribution and its entire regulatory scheme have been premised on a statutorily-mandated "three-tier" structure, consisting of the manufacturer tier (the brand owners and other primary suppliers, referred to herein for convenience as "brand owners"), the wholesaler tier (the importer-wholesalers) and the retailer tier (the retail outlets). *See* CAL. BUS. & PROF. CODE §25500 *et seq.* (West 1964); *see also California Beer Wholesalers Assn., Inc. v. Alcoholic Bev. Control Appeals Bd.*, 5 Cal. 3d 402, 407, 412, 487 P.2d 745 (1971). Under this system brand owners were able, through private agreements, to designate specific importers as authorized distributors and preclude importation by others. Thus, liquor imported into California was purchased directly from brand owners. (*See* J.A. 57, 61, 91-92; R. Quattrin Declaration at A-7-8, A-12-13.)

In 1973, the California Legislature enacted the original Designation Statute (Cal. Stats. 1973, ch. 707, § 1) to preserve the State's traditional structure for importation and wholesale distribution of brand name liquor. (*See* R. Quattrin Declaration at A-5; *cf.* J.A. 62-63, 67.) The Statute was adopted because California was confronted with the prospect that its distribution system would be disrupted by

importations from other states to importer-wholesalers within the State who were not authorized by brand owners to handle their products. At the time of this enactment, both Minnesota and Oklahoma had laws which, in the absence of action by California, would have permitted exports of brand name liquor from those states to California importer-wholesalers, irrespective of whether the brand owner had selected them to market the brands. (*See* R. Quattrin Declaration at A-5-6; *cf.* J.A. 67.) This was possible because those States had "open wholesaling" systems of distribution whereby each wholesaler had a statutory right to purchase any brand of liquor from any brand owner who chose to market his brand in the State. MINN. STAT. ANN. § 340.114 (West 1972); 37 OKLA. STAT. tit. 37, § 533 (West 1958). In addition, the wholesaler was not prohibited from selling and exporting liquor to other states.[5] For example, Oklahoma law permits an Oklahoma wholesaler to order liquor from a distiller for delivery in Oklahoma and then either reroute the shipment to California while it is in transit or reship it to California after delivery in Oklahoma. (*See* J.A. 113-14.)[6]

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[5]While maintaining its open wholesaling law, Minnesota has eliminated the free export feature from its distribution system through the enactment in 1978 of an express prohibition on resale out-of-state without the manufacturer's permission. MINN. STAT. ANN. § 340.145 (West 1978). *See Dakota Wholesaler Liquor v. Minnesota*, 584 F.2d 847, 848 (8th Cir. 1978) (affirming the denial of a motion to enjoin enforcement of Minnesota's prohibition on such exports).

[6]All distillers marketing in Oklahoma must sell distilled spirits to any and all licensed Oklahoma wholesalers. OKLA. STAT. tit. 37, § 533 (West 1958). Distillers may not place a limit on quantity and are required to fill orders in the sequence received, at prices no higher than the prices charged to wholesalers in any other state. *Id.* §§ 533, 536.1; Regulations of the Oklahoma Beverage Control Board, art. 3, § 1(4)(e) and (h). (*See also* P.A.C 19-20.) Furthermore, Oklahoma wholesalers are expressly authorized to resell distilled spirits out-of-state to all "qualified persons." OKLA. STAT. tit. 37, § 521(e) (West 1958). (*See also* P.A.C 19-20.)

Despite the latter provision, the Attorney General of Oklahoma recently has ruled that distillers may enter into agreements with wholesalers binding them not to resell liquor to other wholesalers, including

As enacted in 1973, the Designation Statute was a law of general application, designed to protect California's liquor distribution system from erosion by imports of branded liquor, not authorized by the brand owner, from Minnesota, Oklahoma and other states. (*See* J.A. 63, 67.) To this end, the Statute prohibited a California importer from purchasing or accepting delivery of any branded distilled spirits unless designated as an authorized importer "*by the licensee who filed the minimum price schedule for such brand* pursuant to Business and Professions Code § 24755." (Cal.Stats. 1973, ch. 707, § 1 (emphasis added).) Under California Business and Professions Code section 24755, repealed in 1980, brand owners or their agents were required to file a minimum price schedule with the Department of Alcoholic Beverage Control in connection with the price maintenance feature of California's liquor fair trade laws.

In May 1978, the California Supreme Court, in *Rice v. Alcoholic Bev. Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476 (1978), held that section 24755 was invalid because it was part of a statutory price-fixing scheme preempted by the Sherman Act. The validity of the Designation Statute was not questioned in the *Rice* case. Nevertheless, the California Department of Alcoholic Beverage Control took the position that the *Rice* decision rendered the Designation Statute unenforceable because there was no longer any licensee who was required to file a minimum price schedule. (*See* J.A. 90; R. Quattrin Declaration at A-10, A-14.)

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out-of-state wholesalers. A state court disagreed with this opinion and entered an order under which all attempts by distillers to control resales or to cease selling to any particular wholesaler are unlawful under Oklahoma law. *Central Liquor Co. v. Oklahoma Alcoholic Bev. Control Bd.*, No. CJ-81-1413 (D. Ct. Okla. Cty. Aug. 11, 1981), appeal pending. The reversal of this order would alleviate one of the problems which prompted California to enact the Designation Statute, but it would have no relevance to the legal issues presented in this case.

Thereafter, a number of nondesignated importers, including some of the petitioners below and certain Oklahoma wholesalers, moved to exploit the gap in the law resulting inadvertently from the decision in *Rice*. The Oklahoma wholesalers purchased leading brands of distilled spirits for resale to the nondesignated California importer-wholesalers. (J.A. 17, 112.) These arrangements, characterized as "the Oklahoma connection" by the California Court of Appeal (P.A. *A* 4), had the effect of materially disrupting California's historic system whereby branded distilled spirits were imported only from the brand owner.

In part for the purpose of eliminating this disruption of the California distribution system by the Oklahoma connection, the California Legislature in 1979 passed Assembly Bill No. 499, which amended the Designation Statute to delete the reference to California Business and Professions Code section 24755 and to provide, in substance, that a California importer shall not purchase or obtain a brand of distilled spirits "unless he is designated as an authorized importer" by the brand owner. In practical effect, the amended version of the Designation Statute is intended to continue the system prevailing under the original version, whereby imports of brand name liquor were channeled to distributors in California who were authorized by the brand owners to accept delivery of such brands. (*See e.g.*, J.A. 62-63, 67, 69.)

By reason of the Court of Appeal's stay of the enforcement of the Statute, issued *pendente lite* and followed ultimately by the issuance of a peremptory writ permanently enjoining the respondent below, Baxter Rice, from enforcing the Statute, the Designation Statute, as amended by Assembly Bill No. 499, never was permitted to take effect. (P.A. *D* 21.)

Summary of Argument.

A state enactment is not preempted by federal law unless the two regulatory schemes are in irreconcilable conflict. The California Court of Appeal clearly erred in concluding

that a conflict exists in this case on the face of the Designation Statute. The Statute does *not* conflict with the Sherman Act because the Statute neither compels nor authorizes conduct prohibited by the Act. The Statute merely facilitates the imposition by brand owners of vertical marketing arrangements, which this Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), held are not *per se* violations of the Sherman Act. As recognized by the Department of Justice in its Brief for the United States or Amicus Curiae ("United States Brief"), filed in this case, the purposes of the antitrust laws are served by recognizing that the Designation Statute does not immunize the conduct of private parties from antitrust scrutiny should they act to restrain trade unreasonably. (United States Brief at 13-14.)

Even if it were concluded that the Designation Statute does conflict with the Sherman Act, the Statute is validated by the Twenty-first Amendment because it falls within the State's "virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system." *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 110 (1980). Therefore, no balancing of competing federal and state interests is required or appropriate in this case, and the California Court of Appeal erred in embarking upon such an inquiry. Assuming, *arguendo*, that such an inquiry were warranted, the court below failed to strike the proper balance between federal and state interests because it misunderstood the nature of the federal interests involved and misconceived both the extent to which the federal interests may be impaired and the extent to which valid California interests are protected by the Designation Statute.

Assuming, *arguendo*, a conflict with the antitrust laws, the Court of Appeal also erred in holding that the Designation Statute does not fall within the state action exemption to the Sherman Act. It is not disputed that the Statute reflects a clearly articulated state policy. Accordingly, it was error

for the court below to invalidate the Statute because the State has not had an opportunity to exercise the degree of supervision necessary to satisfy the requirements set forth in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, for application of the exemption.

If it intended to rely on the Commerce Clause as an alternative ground for invalidating the Designation Statute, the court below clearly was wrong. The Statute does not, on its face, discriminate against or constitute an impermissible burden on interstate commerce. In addition, the Designation Statute falls squarely within the State's authority under the Twenty-first Amendment and therefore is unconfined by traditional Commerce Clause limitations.

ARGUMENT.

A. The Designation Statute Is Not Invalidated by the Sherman Act. In Reaching a Contrary Conclusion, the Court of Appeal Misapplied This Court's Decision in Continental T.V. v. GTE Sylvania.

1. A State Statute Is Not in Conflict With the Sherman Act Unless the State Enactment Compels or Sanctions Antitrust Violations by Private Parties.

There is a "strong policy against invalidating state regulatory schemes [on preemption grounds] in the absence of a clear showing of *irreconcilable conflict* with federal law. . . ." *Swift & Co., Inc. v. Wickham*, 364 F.2d 241, 246 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967) (emphasis added). "[T]he proper approach is to reconcile 'the operation of both statutory schemes with one another rather than holding [the state scheme] completely ousted.' " *De Canas v. Bica*, 424 U.S. 351, 358 n.5 (1976), quoting *Merrill Lynch, Pierce, Fenner & Smith v. Ware*, 414 U.S. 117, 127 (1973). As this Court said in *Goldstein v. California*, 412 U.S. 546 (1973):

> We must . . . be careful to distinguish those situations in which the concurrent exercise of a power by the Federal Government and the States or by the State alone *may possibly* lead to conflicts and those situations where conflicts *will necessarily* arise. "It is not . . . a mere possibility of inconvenience in the exercise of powers, but an immediate constitutional repugnancy that can by implication alienate and extinguish a pre-existing right of [state] sovereignty." The Federalist No. 32, p. 243.

412 U.S. at 554-55 (emphasis in original).

The Court has consistently applied these principles in cases involving an alleged conflict between a state enactment and the federal antitrust laws. For example, in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35 (1966), the Court considered a Sherman Act challenge to a New

York price affirmation law which required brand name distillers to file monthly price schedules of liquor sales to wholesalers and retailers and affirm that the prices were no higher than the lowest prices at which sales were made anywhere else in the country during the preceding month. As a result of a series of stays issued by the lower courts, the affirmation law had not yet gone into effect at the time the case reached this Court, and therefore the Court was only concerned with the validity of the New York law *on its face* (*id.* at 41), which is precisely the posture of the present case.

On the issue of whether the state legislation conflicted with the antitrust laws, the Court in *Seagram* began with the premise that "[i]n this as in other areas of coincident federal and state regulation, the 'teaching of this Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' " *Id.* at 45, quoting *Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 446 (1960). The Court then concluded:

> We find no such clear conflict in the present case. The bare compilation, without more, of price information on sales to wholesalers and retailers to support the affirmations filed with the State Liquor Authority would not of itself violate the Sherman Act. Section 9 [the price affirmation provision of the New York enactment] imposes no *irresistible economic pressure* on the appellants to violate the Sherman Act in order to comply with the requirements of § 9. On the contrary, § 9 appears firmly anchored to the assumption that the Sherman Act will deter any attempts by the appellants to preserve their New York price level by conspiring to raise the prices at which liquor is sold elsewhere in the country.

384 U.S. at 45-46 (citations omitted) (emphasis added).

Although recognizing that it was possible "to envision circumstances under which price discriminations proscribed

by the Robinson-Patman Act might be compelled" by the New York price affirmation law, the *Seagram* Court held that "the existence of such potential conflicts is entirely too speculative in the present posture of this case" to foreclose New York from enforcing its price affirmation law. *Id.* at 46. Accordingly, the Court held that the state law, on its face, was constitutionally valid as against an antitrust attack. *Id.* at 52.

A conflict warranting preemption of a state law has been found by this Court only where the Court has determined that a state statute clearly purported to require or authorize a *per se* violation of the antitrust laws. Thus, in *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) ("*Midcal*"), the Court struck down California's retail price maintenance and price posting statutes for the wine trade on the ground that the conduct required by the statutes "plainly constitutes resale price maintenance in violation of the Sherman Act." *Id.* at 103 (citations omitted). The Court in *Midcal* relied on *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384 (1951), in which the state-enforced nonsigner provision of a Louisiana statute which sanctioned and enforced retail price maintenance was held *per se* violative of the Sherman Act.[7]

Schwegmann was distinguished in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). In the latter case, plaintiffs challenged provisions of Cali-

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[7] *Midcal* and *Schwegmann* are the only cases in which this Court has invalidated a state law on the ground that it conflicted with the federal antitrust laws. The few lower court decisions in which a state law was invalidated on federal antitrust grounds also involved state-mandated price fixing schemes. *See Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971); *Rice v. Alcoholic Bev. Control Appeals Bd., supra*, 21 Cal. 3d 431, 579 P.2d 476 (1978); *Capiscean Corp. v. Alcoholic Bev. Control Appeals Bd.*, 87 Cal. App. 3d 996 (1979); *Mezzetti Assoc., Inc. v. State Liquor Authority*, 51 N.Y.2d 761, 411 N.E.2d 791 (1980) (opinion on reargument).

fornia's Automobile Franchise Act which required that a motor vehicle manufacturer secure the approval of the California New Motor Vehicle Board before opening a retail automotive dealership within a marketing area in the event an existing franchisee objected to the establishment of the new franchise. In concluding that the state law did not contravene the Sherman Act, the Court stated:

> Appellees' reliance upon *Schwegmann Bros. v. Calvert Distillers Corp., supra,* is misplaced. In *Schwegmann, the State attempted to authorize and immunize private conduct violative of the antitrust laws.* California has not done that here.

Id. at 110 (citations omitted) (emphasis added).

The Court emphasized that a good faith objection by an existing dealer would not violate the Sherman Act but warned that dealers submitting "sham protests . . . for the sole purpose of delaying the establishment of competing dealerships may be vulnerable to suits under the federal antitrust laws." *Id.*

The principle which emerges from the cases is that a conflict between the federal antitrust laws and a state law does not arise unless the state law is found plainly to compel or sanction private conduct which violates the antitrust laws. *The mere possibility that private parties, purporting to act pursuant to the statute, may engage in conduct violative of the antitrust laws does not provide a basis for invalidating a state statute. See Joseph E. Seagram & Sons, Inc. v. Hostetter,* 384 U.S. at 45-46 (1966); *Colby Distributing Co., Inc. v. Lennen,* 227 Kan. 179, 606 P.2d 102, 110 (1980), *appeal dismissed sub nom. Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 449 U.S. 943 (1980). A corollary to this rule is that at least in those situations where a state statute does not require an antitrust violation, private parties who violate the Sherman Act may not assert the state statute as a defense to suits brought against them

under the Act. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 593 (1976). *See also Allied Artists Pictures Corp. v. Rhodes*, 496 F.Supp. 408, 449-51 (S.D. Ohio 1980).

2. The Designation Statute Does Not Compel or Sanction an Antitrust Violation.

The issue in the present case is whether the Sherman Act necessarily proscribes a state-approved distribution system whereby manufacturers (brand owners) select the distributors for their products (importer-wholesalers) and the state makes the selection effective by precluding non-designated distributors within the state from purchasing the manufacturer's products from other out-of-state suppliers. In holding the Designation Statute invalid on its face, the court below reasoned that a statute which effectively authorizes private parties to prevent interstate commerce between other private parties "is in direct contravention of the express terms of . . . the Sherman Act." *Norman Williams Co. v. Rice*, 108 Cal. App. 3d 348, 358 (1980). The Court of Appeal in effect held that such conduct constitutes a *per se* violation of the Sherman Act. *See id.* at 356-58.

The California Court of Appeal's fundamental error was its failure to recognize that the essence of what is involved in this case is the legality under the antitrust laws of a brand owner's vertical allocation of the market for his product, which this Court held in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977) ("*GTE Sylvania*"), does *not* constitute a *per se* violation of the Sherman Act. Instead, the legality of such marketing arrangements must be determined under the rule of reason—a test which the Court of Appeal did not apply and could not have applied on the

record below because the Statute, as amended, has not been allowed to operate.[8]

In reaching the result it did, the California Court of Appeal applied the same reasoning as this Court did in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967) ("*Schwinn*"), which was overruled in *GTE Sylvania*. In *Schwinn*, the Court considered the legality of a franchising system whereby a manufacturer prohibited its designated distributors and retailers from selling to non-franchised retailers. Except for the facts that the distribution system in *Schwinn* operated at the retail level and was established by contract, the type of vertical arrangement under consideration in that case and its economic effect are directly analogous to the California liquor distribution system authorized by the Designation Statute.

The Court in *Schwinn* held that the vertical arrangements in question were *per se* illegal because "[u]nder the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." 388 U.S. at 379. *This is precisely the approach adopted by the Court of Appeal in the present case* in holding that the Designation Statute violates the Sherman Act solely because the Statute "allows the man-

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[8]Research has not disclosed a single case in which the rule of reason was applied to determine the validity of a state law, as distinguished from the legality of private conduct. See fn. 7, *supra*. Even if there were circumstances under which the validity of a state statute could be adjudicated under the rule of reason, the Designation Statute does not present such a situation. If a brand owner's selective designations create an unreasonable restraint on trade, he may be sued for violating the Sherman Act. The Designation Statute would not provide a defense because it does not purport to authorize an antitrust violation. (*See* discussion at pp. 21-22, *infra*.) It does not follow from the hypothetical possibility that private parties may violate the antitrust laws that the Designation Statute is invalid on its face. *Compare Joseph E. Seagram & Sons v. Hostetter*, 384 U.S. at 45-46; *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. at 110.

ufacturer to forbid others to sell to a disfavored importer." *Norman Williams Co.*, 108 Cal. App. 3d at 357.

In *GTE Sylvania*, it was alleged that defendant Sylvania, a manufacturer of television sets, had violated the Sherman Act by including in its franchise agreements with retailers a prohibition against the sale of Sylvania products from other than specified locations. Relying on *Schwinn*, the trial court instructed the jury that any effort by Sylvania to restrict the outlets or store locations from which dealers could sell Sylvania merchandise after Sylvania parted with title to the goods was a violation of the Sherman Act, "regardless of the reasonableness of the location restrictions." 433 U.S. at 41. Judgment was entered against Sylvania. On certiorari, this Court reversed, flatly rejecting the inflexible approach of *Schwinn* in favor of a return to the rule of reason. The Court in *GTE Sylvania* concluded that *Schwinn* represented "an abrupt and a largely unexplained departure from *White Motor Co. v. United States*, 372 U.S. 253 (1963), where only four years earlier the Court refused to endorse a *per se* rule of illegality for vertical restrictions." 433 U.S. at 47.

The Court in *GTE Sylvania* recognized that vertical customer and territorial arrangements may have significant "redeeming virtues," such as promoting interbrand competition by enabling the manufacturer to achieve certain efficiencies in the distribution of his product.[9] *Id.* at 54. Because there had been no showing that vertical restrictions, either generally or of the type used by Sylvania, "have a 'pernicious effect on competition' or . . . 'lack . . . any redeeming virtue,' " the Court concluded that the "*per se*

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[9]The Court added that the fact that a particular restraint may not represent the least restrictive means of restraint available to a manufacturer does not make it any less proper a subject for review under the rule of reason. *Id.* at 58 n.29.

rule stated in *Schwinn* must be overruled.'"[10] *Id.* at 58 (citation and footnotes omitted).

The Court of Appeal in the present case failed to recognize that the case before it was functionally indistinguishable from *GTE Sylvania*. The court below stated:

> We find the decision in *Continental T.V. Inc. v. GTE Sylvania Inc.* to be inapposite to the statutory provision which we consider. That case involved a manufacturer's chosen method of product distribution enforced by refusal to sell to retailers outside of their assigned territories. Petitioners herein do not attack the decision of distillers to refuse to trade with them; rather, they attack the state-provided authority of the distillers to prevent them from trading with others. Nothing in *Continental T.V. Inc. v. GTE Sylvania Inc.* authorizes a state to delegate such power to a private party.

108 Cal. App. 3d at 357.

This passage shows that the court below simply did not understand *GTE Sylvania*. The issue addressed by this Court in that case (and in *Schwinn*) was the legality of a marketing arrangement *whereby the manufacturer prohibited downstream distributors or retailers who had acquired title to the manufacturer's merchandise from dealing with third parties*. In practical effect, no distinction can be made be-

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[10]Vertical marketing arrangements have also been held subject to the rule of reason in a variety of other circumstances. *See, e.g., White Motor Co. v. United States*, 372 U.S. 253 (1963) (Rule of reason held applicable to arrangement whereby truck manufacturer precluded its authorized dealers from selling to any federal or state government without the manufacturer's prior written consent); *General Bev. Sales Co. v. East-Side Winery*, 568 F.2d 1147, 1152-53 (7th Cir. 1978) (Rule of reason held applicable to wine manufacturer's territorial restriction barring distributors from selling to customers outside of the distributors' designated territories); *Adolph Coors Co. v. A & S Wholesalers, Inc.*, 561 F.2d 807 (10th Cir. 1977) (Rule of reason held applicable to beer brewer's requirement that its wholesale distributors refrain from selling to persons outside of designated western states); *accord Lamp Liquors, Inc. v. Adolph Coors Co.*, 563 F.2d 425 (10th Cir. 1977).

tween the marketing impact of this type of arrangement and the vertical marketing arrangements authorized by the Designation Statute. If a brand owner contractually prohibited out-of-state wholesalers from *selling* to nondesignated California importers (assuming the other state's law did not preclude such arrangements), the legality of the arrangement under the Sherman Act would be determined under the rule of reason. No different rule can apply in determining the legality of vertical arrangements under the Designation Statute since the Statute achieves precisely the same economic result by forbidding nondesignated California importers from *buying* from out-of-state wholesalers.

As pointed out by the Department of Justice in its Brief for the United States as Amicus Curiae, filed in this case at the invitation of the Court, a primary purpose of the Designation Statute is simply to nullify in California the extraterritorial effect of an Oklahoma statutory scheme which disables brand owners from establishing vertical marketing arrangements by contract with Oklahoma wholesalers.[11] (United States Brief at 3-4, 17.) Oklahoma requires brand owners who wish to market their products in that State to sell to all Oklahoma wholesalers and permits Oklahoma wholesalers to sell to out-of-state buyers. This has led to sales by Oklahoma wholesalers to California wholesalers not selected by the brand owners, thus foisting Oklahoma's "open wholesaling" scheme onto California. As noted by the Department of Justice (United States Brief at 17), the Designation Statute merely severs the "Oklahoma connection" and thus reinstates the right of brand owners to choose their California distributors. The net effect is precisely the same as if neither the Oklahoma statutes nor the Designation

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[11]The Designation Statute also protects California's chosen system of liquor distribution against disruption should states other than Oklahoma and Minnesota adopt "open wholesaling" systems, or should wholesalers in other states violate contractual restrictions on resale to wholesalers who have not been designated by the brand owner.

Statute had been enacted, in which case brand owners would have been free to establish vertical allocations of the California wholesale market by entering into contracts with Oklahoma wholesalers (and others) precluding resales to nondesignated California wholesalers. The Court of Appeal failed to apply *GTE Sylvania* because it focused on the *manner* in which this vertical marketing arrangement is enforced (*i.e.*, by the State) rather than on the *economic effect* which it has in the California marketplace.

GTE Sylvania demonstrates that, even absent state involvement, vertical allocation of the market for a product is not a *per se* antitrust violation. *A fortiori*, California's endorsement of vertical marketing arrangements, by enactment of the Designation Statute, cannot conceivably be held to constitute a *per se* violation of the Sherman Act.[12] Indeed, as hereinafter discussed, pursuant to the Twenty-first Amendment and the state action exemption, the involvement of the state may legalize marketing arrangements for distilled spirits which would otherwise be prohibited by the antitrust laws. Thus, the Court of Appeal's preoccupation with the "power" conferred on private parties by the Designation Statute is misplaced.[13] A remarkably similar argument was considered by this Court, and firmly rejected, in *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978). After concluding that California's Automobile Franchise Act did not compel or sanction a violation of the Sherman Act (*id.* at 110), the Court stated:

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[12]The Department of Justice noted in its brief that the fact that the Designation Statute gives the force of state law to a brand owner's selection of wholesalers to import its product "has no incremental effect on competition because . . . the designation statute does not insulate that selection from scrutiny under the antitrust laws." (United States Brief at 17 n.13.)

[13]The Court of Appeal also repeatedly stressed that the Designation Statute affects interstate commerce. 108 Cal. App. 3d at 356-58. An effect on interstate commerce is a jurisdictional prerequisite to analysis under the Sherman Act; it does not in and of itself establish a violation.

> *Appellees also argue conflict with the Sherman Act because the Automobile Franchise Act permits auto dealers to invoke state power for the purpose of restraining intrabrand competition.* "This is merely another way of stating that the . . . statute will have an anticompetitive effect. In this sense, there is a conflict between the statute and the central policy of the Sherman Act—'our charter of economic liberty.' . . . Nevertheless, *this sort of conflict cannot itself constitute a sufficient reason for invalidating the . . . statute.* For if an adverse effect on competition were, in and of itself, enough to render a state statute invalid, the States' power to engage in economic regulation would be effectively destroyed." *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133, 98 S.Ct. 2207, 2218, 57 L.Ed.2d 91 (1978).

439 U.S. at 110-11 (emphasis added).

The Designation Statute on its face merely prohibits California importer-wholesalers from purchasing a brand owner's products unless they have been designated by the brand owner or his agent. Clearly, it does not *compel* brand owner conduct which violates the antitrust laws. Each brand owner is free to designate as many importers as he chooses. Nothing in the Designation Statute prevents a brand owner from designating every licensed importer in the State, and nothing precludes a licensed importer from negotiating freely with a brand owner to obtain his designation. Further, nothing in the Designation Statute requires the creation of exclusive wholesale territories within California.

It is also clear that the Designation Statute does not purport to *authorize* conduct violative of the Sherman Act. If a brand owner designates or declines to designate authorized importers in such fashion as to violate the Sherman Act, nothing in the Statute purports to sanction such anticom-

petitive conduct.[14] *See Colby Distributing Co., Inc. v. Lennen*, 606 P.2d at 110. The Department of Justice, in its amicus brief in this case, acknowledged that "[t]he purposes of the antitrust laws would be fully served by recognizing that the Designation Statute does not insulate the brand owner's conduct from scrutiny under the antitrust laws." (United States Brief at 13-14.) Here, as in *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 45-46, the state law is "firmly anchored to the assumption that the Sherman Act will deter" antitrust violations.

Because the Designation Statute does not compel or sanction any antitrust violation, this case stands in vivid contrast to *Midcal*, in which the state regulatory program in issue was invalidated because it mandated a "private price fixing arrangement," which is a *per se* violation of the Sherman Act. *Midcal*, 445 U.S. at 106. Accordingly, the judgment below must be reversed.

3. The Facts of This Case Do Not Warrant the Creation of a New Category of Per Se Violations.

Even if *GTE Sylvania* were not controlling in the present case, it is clear that the Court of Appeal erred in concluding that the Designation Statute, *on its face*, is *per se* violative of the Sherman Act.

The Court in *GTE Sylvania* emphasized that "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." 433 U.S. at 58-59. The California Court of Appeal in the present case conceded that the Designation Statute was "unique" and was "difficult to analyze" in terms of any previously recognized categories of *per se* violation of the Sherman Act (*i.e.*, price fixing,

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[14]Moreover, "[this] Court has already decided that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Cantor v. Detroit Edison Co.*, 428 U.S. at 592-93 (footnotes omitted).

group boycotts or concerted refusals to deal, certain types of tying arrangements and horizontal market divisions). 108 Cal. App. 3d at 356. Nevertheless, the court, without the benefit of any factual analysis or consideration of the legitimate purposes served by the Designation Statute, ruled that the Statute was facially invalid. *Id.* at 356-58. The lower court thus embarked upon precisely the same process of "formalistic line drawing" employed in *Schwinn* but subsequently rejected in *GTE Sylvania*.

At a minimum, creation of a new category of *per se* Sherman Act violation requires a detailed factual evaluation of the actual economic effect of the marketing arrangement on competition in the marketplace in order to determine whether it has a "pernicious effect on competition," *and* a further inquiry into whether the arrangement lacks "any redeeming virtue." *GTE Sylvania*, 433 U.S. at 54, 58. The court below manifestly failed to point to any facts, applicable precedent or persuasive analysis which would justify a *per se* rule of illegality in this case.

Furthermore, this Court has repeatedly counseled caution and judicial restraint with respect to new departures from the rule of reason. "It is only after *considerable experience* with certain business relationships that the courts classify them as *per se* violations. . . ." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-08 (1972) (emphasis added). *See also White Motor Co. v. United States*, 372 U.S. at 263. "The usual assumption is that a *per se* rule would grow out of a history of rule of reason cases all arriving at the same verdict." *Northwest Power Products, Inc. v. Omark Industries*, 576 F.2d 83, 88 (5th Cir. 1978). For example, in reversing a lower court's holding that the issuance of blanket licenses to perform copyrighted musical compositions is *per se* illegal, this Court, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), emphasized that even though the legality of such licensing practices had been considered in other cases,

there was "no nearly universal view" that the practices constitute "a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to careful assessment under the rule of reason." *Id.* at 16.

Similarly, there exists "no nearly universal view" that a state's sanction of vertical arrangements of the type authorized by the Designation Statute merits automatic condemnation under the Sherman Act. *Indeed, all relevant authorities are to the contrary.* In *Colby Distributing Co., Inc. v. Lennen,* the Kansas Supreme Court rejected a Sherman Act challenge to the validity of a Kansas law which established a vertical allocation of the wholesale branded liquor market to designated wholesalers. The Kansas law prohibited Kansas wholesale distributors from selling a brand of distilled spirits unless they were authorized by the distiller. To this extent the Kansas law is indistinguishable in effect from the Designation Statute, which prohibits California importer-wholesalers from purchasing or accepting delivery of distilled spirits unless designated by the brand owner. Moreover, the Kansas law goes further than the California statute here at issue by requiring exclusive territorial distributorships. Yet the Kansas Supreme Court held that "[t]he provisions of the [the Kansas law] on its [sic] face will allow sufficient brand and price competition to withstand allegations of a violation of the Sherman Anti-Trust Act." 606 P.2d at 110. This Court summarily dismissed an appeal from the Kansas court's decision in *Colby* for want of a substantial federal question. *Grant-Billingsley Wholesale Liquor Co., Inc. v. Lennen,* 449 U.S. 943 (1980).

Even absent state sanction, vertical marketing arrangements consisting of territorial or customer restrictions have been uniformly upheld when tested under the rule of reason. For example, based on the decision in *GTE Sylvania,* the *Schwinn* case itself was reopened, and the district court adjudged that the territorial and customer restrictions which Schwinn had included in its dealer agreements were valid

under the rule of reason. *United States v. Arnold, Schwinn & Co.*, 442 F.Supp. 1366, 1388 (N.D. Ill. 1977). *See also Muenster Butane, Inc. v. The Stewart Co. Inc.*, 651 F.2d 292 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15 (4th Cir. 1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751, 754-56 (9th Cir. 1980); *First Beverages, Inc. of Las Vegas v. Royal Crown Cola Co.*, 612 F.2d 1164 (9th Cir. 1980); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 461 F.Supp. 1046 (N.D. Cal. 1978) (decision on remand).

In a recent University of Chicago Law Review article, the Honorable Richard A. Posner, now a Judge of the United States Court of Appeals for the Seventh Circuit, argued persuasively for application of a *per se* rule of *legality* in the case of vertical marketing arrangements. Posner, *The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality*, 46 U. CHI. L. REV. 6 (1981). The author, who was at the time a professor of law at the University of Chicago and a leading antitrust commentator, noted that "in no case, even in the Post-*Sylvania* period, when courts have required or at least permitted a deeper exploration of the facts than in the *Schwinn* era of per se illegality, has a *purely* vertical restriction on competition been shown to be anti-competitive."[15] *Id.* at 22 (emphasis in original).

In its amicus brief in this case, the Department of Justice, which has the principal responsibility for enforcing the Sherman Act, concluded that the Designation Statute does not conflict with the Sherman Act and that "[i]n the absence of an inconsistency with federal law, there is no reason to displace valid state interests in regulating liquor that the statutory designation requirement may serve—such as mon-

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[15]The pro-competitive aspects of vertical marketing arrangements are discussed extensively in the Brief of Petitioner Bohemian Distributing Company, Case No. 80-1030.

itoring and tracing of imported distilled liquor, aiding in the collection of excise taxes, or even facilitating the vertical imposition of *pro*-competitive territorial restraints."[16] (United States Brief at 13-14 (citation omitted) (emphasis in original); *see also id.* at 19 n.17.) Similarly, in *A.H. Cox, & Co. v. Star Machinery Co.*, 653 F.2d 1302, 1306 (9th Cir. 1981), the court recognized that "[c]ompetition is promoted when manufacturers are given wide latitude in establishing their method of distribution and in choosing particular distributors."[17] The promotion of interbrand competition and the other purposes served by the Designation Statute preclude a finding that it is without "any redeeming virtue" so as to merit application of a *per se* rule of illegality.

It manifestly cannot be concluded that the Designation Statute, on its face, is in "irreconcilable conflict" with the federal antitrust laws. In reaching a contrary conclusion, the Court of Appeal failed to recognize that the Designation Statute does not either compel or sanction conduct which violates the Sherman Act and does not immunize from judicial scrutiny private conduct resulting in an unreasonable restraint on trade. Thus, the court below violated the fun-

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[16]Although the views of the Department of Justice are of course not controlling, they are entitled to weight and, at the very least, caution against too ready a finding of *per se* invalidation. *See Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. at 14-16.

[17]The Court in *GTE Sylvania* recognized that although vertical marketing arrangements reduce *intrabrand* competition, they promote *interbrand* competition, which is the primary concern of the antitrust laws. 433 U.S. at 54-56. The court below, however, relied on *United States v. Topco Assocs., Inc.*, 405 U.S. at 609-10, for the proposition that the distinction between an effect on intrabrand competition and interbrand competition is "irrelevant" in this case. 108 Cal. App. 3d at 357. The same proposition was rejected in *GTE Sylvania* on the ground that *Topco* involved a "horizontal restriction among ostensible competitors." 433 U.S. at 57, n.27. Horizontal restrictions of the type involved in *Topco* have long been held to constitute a *per se* violation of the Sherman Act (*United States v. Topco Associates, Inc.*, 405 U.S. at 608), making an analysis of any purported justification unnecessary. Clearly, the Designation Statute does not compel, sanction or encourage horizontal restraints among competitors.

damental precept that "enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists." *Huron Portland Cement Co. v. City of Detroit, Michigan*, 362 U.S. 440, 446 (1960).

B. The Twenty-First Amendment Validates the Designation Statute.

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, this Court reviewed its prior decisions interpreting the Twenty-first Amendment and concluded:

> These decisions demonstrate that there is no bright line between federal and state powers over liquor. *The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system.* Although States retain substantial discretion to establish *other* liquor regulations, *those* controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case."

445 U.S. at 110 (citation omitted) (emphasis added).

The Court in *Midcal* described the analysis to be applied by a state or federal court in deciding whether a state liquor regulation is saved by the Twenty-first Amendment from preemption by the Sherman Act, as follows:

1. The court must first answer the "threshold question" whether, apart from the Twenty-first Amendment, the statute conflicts with the Sherman Act. *Id.* at 102. If there is no such conflict, the state statute is not preempted and the court's inquiry need not proceed further.

2. If a conflict between the state statute and the Sherman Act is found to exist, the court must next determine if the statute concerns the state's decision whether to permit importation or sale of liquor, or how to structure the liquor distribution system. If the statute deals with either or both

of those subjects, then it is valid under the Twenty-first Amendment and hence is not preempted by the Sherman Act. *Id.* at 110. Again, there is no need for the court to inquire further once this determination is made.

3. If the statute is another kind of liquor regulation *and* it conflicts with the Sherman Act, the Court must then analyze the competing state and federal interests involved to determine whether the protection of state interests afforded by the statutory scheme is outweighed by its impairment of the federal interest protected by the Sherman Act. *Id.* at 110-14. Only if that question is answered affirmatively—as it was in the special circumstances of *Midcal*—should the state statute be held preempted by the Sherman Act.

In this case, the Court of Appeal erred at each step of the analysis required by *Midcal*.

First, as we have shown (at pp. 11-27, *supra*), there is no conflict between the Designation Statute and the Sherman Act.

Second, the Designation Statute falls within *both* elements of California's plenary power over "whether to permit importation or sale of liquor and how to structure the liquor distribution system." *Midcal*, 445 U.S. at 110.

In this connection the several States' "virtually complete control over whether to permit importation . . . of liquor" is not limited to determining whether a state is to be either "wet" or "dry," but extends as well to deciding *who* is to be permitted to import liquor and *what brands* each may import. For example, in *State Board of Equalization v. Young's Market Co.*, 299 U.S. 59 (1936), the Court considered the validity of a California law which limited the persons authorized to import beer to those who paid a $500 license fee for the privilege. Although recognizing that the imposition of such a fee as a condition of importation "would obviously have been [an] unconstitutional" burden on interstate commerce prior to the ratification of the

Twenty-first Amendment, the Court concluded that such a regulation was within the scope of the state's authority under the Amendment. *Id.* at 62. Justice Brandeis, speaking for the Court, stated in unqualified terms the scope of a state's power to determine whether and by whom liquor may be imported:

> The Amendment which "prohibited" the "transportation or importation" of intoxicating liquors into any state "in violation of the laws thereof," abrogated the right to import free, so far as concerns intoxicating liquors. *The words used are apt to confer upon the state the power to forbid all importations which do not comply with the conditions it prescribes.*
>
> . . . Surely the state may adopt a lesser degree of regulation than total prohibition. Can it be doubted that a state might establish a state monopoly of the manufacture and sale of beer, and either prohibit all competing importations, or discourage importation by laying a heavy impost, or channelize desired importations by confining them to a single consignee?

Id. at 62-63 (citations omitted) (emphasis added).

The Court also made it clear that the State's authority extended to control over the types of alcohol which may be imported as well as to the persons authorized to import it:

> There is no basis for holding that it [the State] may prohibit, or so limit, importation only if it establishes monopoly of the liquor trade. It might permit the manufacture and sale of beer, while prohibiting absolutely hard liquors. If it may permit the domestic manufacture of beer and exclude all made without the State, may it not, instead of absolute exclusion, subject the foreign article to a heavy importation fee?

Id. at 63.

As was the case in *Young's Market*, California here has chosen to "channelize desired importations by confining them" to persons meeting certain statutorily-established

criteria. Exercising its power under the Twenty-first Amendment, California has long prohibited importation except by wholesalers who hold an importer's license. CAL. BUS. & PROF. CODE §§ 23775 and 23027 (West 1964). Since 1973, California has prohibited importation of branded liquor except by importer-wholesalers who are designated by brand owners to handle their products. These enactments of the California Legislature are clearly within the State's plenary control over whether to permit importation of liquor.[18] Indeed, the conduct in which petitioners below have engaged is proscribed by the express language of the Twenty-first Amendment itself: "The . . . *importation* into any state . . . for delivery or use therein of intoxicating liquors, in violation of the laws thereof, *is hereby prohibited.*"[19] (emphasis added.)

Enactment of the Designation Statute also falls within California's "virtually complete control over . . . how to structure the liquor distribution system." The Statute reflects California's continuing preference for a distribution system whereby brand owners select the distributors for

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[18]Other cases in which this Court upheld state enactments prohibiting the importation of liquor or—as in the present case—conditioning such importation upon the importer's compliance with state requirements include *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939), and *Indianapolis Brewing Co. v. Liquor Control Commission*, 305 U.S. 391 (1939) (both prohibiting importation of liquor from states which forbid importation from other states); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938) (prohibiting importation of any brand of liquor having an alcohol content of more than 25 percent by volume unless the brands is registered in the U.S. Patent Office); *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 2d 179, 606 P.2d 102, appeal dismissed sub nom. *Grant-Billingsley Wholesaler Liquor Co., Inc. v. Lennen*, 449 U.S. 943 (1980) (prohibiting wholesale distributors from selling a brand of distilled spirits unless authorized by the distiller). In *none* of these cases did the Court find it appropriate to balance the competing federal and state interests involved.

[19]In *Midcal*, the Court acknowledged that "[i]n determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the provision. . . ." 445 U.S. at 106-07 (citation omitted).

their products, as opposed to an "open wholesaling" distribution system, whereby all wholesalers have access to all brands. Moreover, the Statute reconfirms California's historic decision to have a three-tier distribution system, consisting solely of brand owners, California importer-wholesalers and California retailers, as opposed to an administratively more burdensome system, now engendered by the "Oklahoma connection," consisting of brand owners, *Oklahoma wholesalers*, California importer-wholesalers and California retailers. The Designation Statute thus falls well within California's plenary power to decide "how to structure the liquor distribution system" because it protects against the imposition of an undesired "fourth tier" on California's three tier system.[20]

Since the Designation Statute falls within the core of the powers granted to the States by the Twenty-first Amendment, as interpreted in *Midcal*, there was no occasion for the Court of Appeal to balance the competing state and federal interests served by the Designation Statute and the Sherman Act, respectively. If the two enactments were in conflict—which petitioners have shown is *not* the case—the Designation Statute would clearly prevail by virtue of the Twenty-first Amendment, because it deals directly with

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[20]Cases in which this Court upheld state enactments dealing with the structure of a state's liquor distribution system include *Heublein, Inc. v. South Carolina Tax Commn.*, 409 U.S. 275 (1972) (requiring out-of-state distillers to make initial shipments to in-state facilities in care of the distiller's resident representative); *Colby Distributing Co., Inc. v. Lennen*, 227 Kan. 2d 179, 606 P.2d 102, appeal dismissed sub nom. *Grant-Billingsley Wholesaler Liquor Co., Inc. v. Lennen*, 449 U.S. 943 (1980) (determining composition of middle tier of three-tier distribution system by prohibiting distributors from selling a brand of distilled spirits unless authorized by the distiller); *cf. Ziffrin, Inc. v. Reeves*, 308 U.S. 139 (1939) (regulating distribution by permitting transportation of liquor only by common carriers licensed by state). In *none* of these cases did the Court find it appropriate to balance the competing federal and state interests involved.

permission to import liquor and the structure of California's liquor distribution system.[21]

Third, assuming *arguendo* that a balancing test would have been appropriate in the case below, the Court of Appeal erred in two respects when it attempted to determine whether the state interests protected by the Designation Statute were outweighed by the Statute's asserted impairment of the federal interests served by the Sherman Act. Initially, we note that the court misapprehended the nature of the federal antitrust interests and thus attributed too much weight to what it perceived to be the Statute's impairment of federal interests; and further, the court accorded too little weight to the protection of valid state interests which the Designation Statute would have accomplished had it been given an opportunity to serve the purposes for which it was enacted. The court therefore failed to strike the proper balance between the federal and state interests involved in this case.

The Court of Appeal began its analysis with an expansive description of the federal policies served by the Sherman Act:

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[21]It is true that the Court of Appeal stated that the Designation Statute "does not relate to the decision whether to permit the importation and sale of liquor and is not a part of the establishment of the channels of distribution." 108 Cal. App. 3d at 359. The court gave no reasons for this conclusion, and it finds no support in the language of the Statute or in this Court's decisions. Of course, whether or not a state statute is to be interpreted as falling within the ambit of the virtually plenary powers granted to the States, as described in *Midcal*, is a federal question upon which this Court is the final authority, because the question implicates the interpretation of both the Twenty-first Amendment itself and this Court's decisions interpreting the Amendment. The Court of Appeal's determination of that federal question is plainly wrong and should be disregarded by this Court in deciding the validity of the Designation Statute under the Twenty-first Amendment. *See Midcal*, 445 U.S. at 111; *Creswill v. Knights of Pythias*, 225 U.S. 246, 261 (1912); *United States v. Bedford*, 519 F.2d 650, 654 n.3 (3rd Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) ("It is a recognized principle that a federal court is not bound by a state court's interpretation of federal laws or of a state statute under misapprehension of federal law.").

> In *California Liquor Dealers v. Midcal Aluminum, supra,* the United States Supreme Court noted that the federal interest in enforcing the national policy in favor of competition is both familiar and substantial, citing a prior decision in which it was stated: "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."

108 Cal. App. 3d at 360 (citations omitted).

Then, in assessing the extent to which these policies would be impaired by the Designation Statute, the court concluded, without analysis, that the Statute "results in a *complete undermining* of the federal policies embodied in the Sherman Act." *Id.* (emphasis added).

The court's unreasoned conclusion has no rational application to the very limited effect of the Designation Statute on the federal interests protected by the Sherman Act. As we have pointed out (at pp. 19-22, *supra*), the Designation Statute does nothing more than sanction and enforce vertical allocation by brand owners of the California wholesale market for their distilled spirits. This tends to enchance interbrand competition while reducing intrabrand competition, and interbrand competition is the chief concern of the antitrust laws. (*See* discussion at p. 26 n.17, *supra.*) Assuming, *arguendo,* that the legislative plan reflected in the Designation Statute were found by this Court to violate the Sherman Act, the Statute's asserted impairment of competition leading to that conclusion could scarcely be comparable in magnitude and economic effect to that of the mandatory price-fixing scheme which was before the Court in *Midcal.*

In a Twenty-first Amendment balancing of interests analysis, the nature of *federal interests* involved and the extent to which they may be impaired are clearly matters as to

which this Court is the final arbiter. Accordingly, if the third step of the *Midcal* analysis were reached by the Court in this case, the Court should make an *independent*—and markedly different—determination from that of the court below as to the weight to be given any impairment of federal interests which the Designation Statute may cause.

As pointed out in *Midcal*, what *state interests* are protected by a state enactment and the weight to be given them in a Twenty-first Amendment balancing of interests analysis are ultimately for this Court to decide:

> Of course, the findings and conclusions of [state] courts [pertaining to the state interests protected by a statute] are not binding on this Court to the extent they undercut state rights guaranteed by the Twenty-first Amendment.

445 U.S. at 111 (citations omitted).

It is also true, as pointed out in *Midcal*, that this Court

> accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, and we customarily accept the factual findings of state courts in the absence of "exceptional circumstances."

Id. at 111-12 (citations omitted).

However, little weight should be given to the Court of Appeal's cavalier treatment of the state interests which are protected by the Designation Statute. This is because the court below made no attempt to determine how well *in fact* the Statute serves the interests it was enacted to protect. In contrast, the California court in *Midcal* relied on the findings recited in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d 431, 579 P.2d 476 (1978), in which the California Supreme Court determined, as a matter of *fact*, that California's resale price maintenance statutes did not significantly enhance the interests they were asserted to serve, which were the promotion of temperance and the protection of small retailers. After reviewing the factual bases for the

state court's findings, the Court in *Midcal* chose to accept those findings because they were both "supported by the evidence" cited in *Rice* and "reasonable." 445 U.S. at 113. In the present case, however, the Court of Appeal's superficial analysis of the state interests protected by the Designation Statute was unsupported by any evidence or persuasive reasoning. Accordingly, the minimal respect and weight attributed to the Statute by the Court of Appeal, in its attempt to balance the state interests against the federal interests, should not be given any deference by this Court in making its independent determination of the validity of the Statute under the Twenty-first Amendment.

A brief review of some of the purposes served by the Designation Statute confirms that the California interests furthered by the Statute should be given significant weight by this Court in the event the Court reaches the point of balancing state and federal interests in this case. For example, the Designation Statute simplifies the State's task in monitoring and tracing the flow of distilled spirits into California. If the Designation Statute were in effect, the State's control over misbranding, adulteration or contraband involving a brand of distilled spirits imported into California would be strengthened because, in order to determine whether a particular shipment of that brand was legitimately in California, the regulatory authorities would only be required to look to a single supplier (*i.e.*, the brand owner) and to the licensed importers he has designated.[22] Absent the Designation Statute, the State's monitoring function is

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[22]It is true that California law does not, by its terms, require that a designated California importer purchase directly from the brand owner as opposed to purchasing from another wholesaler, in Oklahoma or elsewhere. However, because California has a "price affirmation" law, precluding brand owners from selling distilled spirits to any California wholesaler at a price higher than the lowest price charged in any other state (CAL. BUS. & PROF. CODE § 23673 (West 1981)), there is little, if any, economic incentive for a designated importer to seek an alternative source of supply.

significantly complicated because (1) the number of potential sources of supply for a particular brand has increased due to the addition of Oklahoma wholesalers and potential suppliers from other states, (2) any and all California importers may acquire any brand of distilled spirits, and (3) the location and identity of the importers of a particular brand are subject to monetary change. (*See* R. Wholesalers Association's Memorandum of Points and Authorities in Opposition to Petition for Writ ("Wholesalers' First Memorandum") at 31-33, filed on Dec. 6, 1979 (J.A. 3); R. Memorandum of Points and Authorities of Intervenor Wine and Spirits Wholesalers of California in Support of Return to Alternative Writ ("Wholesalers' Second Memorandum") at 39-42, filed on Jan. 21, 1980. (J.A. 5.) The State unquestionably has a legitimate interest in facilitating the monitoring of distilled spirits transactions in order to assure compliance with its laws. *See, e.g., Heublein, Inc. v. South Carolina Tax Commission,* 409 U.S. 275, 282-83 (1972); *Ziffrin, Inc. v. Reeves,* 308 U.S. 132, 139 (1939).

Similarly, under the Designation Statute, the determination of whether a designated wholesaler has paid California's $2.00-per-gallon excise tax on a brand of distilled spirits (as required by CAL. REV. & TAX. CODE §§ 32201 & 32251 (West 1979)) may be facilitated by comparing the records and inventory of the wholesaler with the records of the brand owner or other primary supplier who ships the liquor. Without the Designation Statute, any brand owner's product may be obtained by any California wholesaler from an Oklahoma wholesaler or other out-of-state supplier who acts solely as a jobber by purchasing from the brand owner for quick resale to a California wholesaler. Such a supplier's records may not be reliable or readily available to aid state authorities in determining whether the California excise tax has been paid. Also, the increased number of out-of-state suppliers and potential California purchasers of a particular brand results in a significantly increased administrative bur-

den on the State in its efforts to verify and enforce the payment of taxes. (*See* R. Wholesalers' First Memorandum at 33-34; R. Wholesalers' Second Memorandum at 43-44.)

Furthermore, California has a legitimate interest in restoring a distribution system to California whereby vertical market allocations are permitted because of their perceived pro-competitive effects on interbrand competition. A brand owner's legitimate interest in assuring the effective and efficient distribution of his products coincides with the State's interests in maintaining the orderly distribution of alcoholic beverages and in encouraging interbrand competition. (*See* discussion at p. 26, *supra; see also* R. Wholesalers' First Memorandum at 35a-35b; R. Wholesalers' Second Memorandum at 47-49.)

Other significant state purposes served by the Designation Statute, and discussed in detail in the briefs, declarations and affidavits submitted to the Court of Appeal, include facilitating the State's enforcement of the three-tier system for distributing distilled spirits (J.A. 52; R. Wholesalers' First Memorandum at 34-35; R. Wholesalers' Second Memorandum at 44), preserving the competitive viability of small retailers (J.A. 52; R. Wholesalers' First Memorandum at 35-36; R. Wholesalers' Second Memorandum at 45-47), and enabling brand owners to protect their goodwill and the integrity of their brand names and trademarks by choosing their distributors (J.A. 52; R. Wholesalers' First Memorandum at 35b; R. Wholesalers' Second Memorandum at 49-50). Individually and collectively, these state purposes demonstrate that substantial state interests are served by the Designation Statute. These state interests are entitled to be given significant weight by this Court should it reach the point of reconciling federal and state interests to determine whether the Designation Statute is a valid enactment by virtue of the Twenty-first Amendment.

C. The Judgment Below Should Be Reversed Because the State Has Not Had an Opportunity to Exercise the Active Supervision Necessary to Bring the Statutory Scheme Within the "State Action" Exemption to the Antitrust Laws.

Assuming, *arguendo*, that the Designation Statute does require or sanction conduct which ordinarily would be prohibited by the Sherman Act, and assuming further that the Statute is not validated by the Twenty-first Amendment, the judgment below was nevertheless erroneous because the state regulatory authorities have not had an opportunity to administer the Statute in a fashion that would bring it within the state action exemption to the antitrust laws which was established in *Parker v. Brown*, 317 U.S. 341 (1943).

In *Midcal*, this Court, after reviewing the cases subsequent to *Parker v. Brown* which adjudicated claims of state action exemption, identified two essential elements necessary to establish antitrust immunity under the state action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." 445 U.S. at 105 (citation omitted).

There can be no dispute, and the California Court of Appeal did not disagree, that the first requirement, namely a clearly declared "state policy," is satisfied in this case. By adopting the Designation Statute, California has unequivocally declared its support for a liquor distribution system whereby distilled spirits are distributed through importer-wholesalers designated by the brand owner as distinguished from an "open wholesaling" system such as the distribution scheme in effect in Oklahoma. However, the Court of Appeal held that the Designation Statute does not provide sufficient state supervision of the private conduct it authorizes in order to meet the second requirement of *Midcal*. 108 Cal. App. 3d at 358-59. This pronouncement was erroneous because it came before the operative date of

the Designation Statute, as amended by California Assembly Bill No. 499, and thus effectively precluded the State from meeting the second requirement through its enforcement and implementation of the Statute.

On January 1, 1980, when the Designation Statute was scheduled to become operative, California had in place an extensive constitutional and statutory framework which provided for the State's ongoing supervision of all phases of the liquor traffic within the State. See *e.g.*, Cal. Const. art. XX § 22; Cal. Bus. & Prof. Code § 24200. The State's authority consists of (1) the power to issue and revoke licenses, and (2) the power to promulgate administrative rules and regulations. *First*, in connection with the State's licensing authority, the Department of Alcoholic Beverage Control has broad disciplinary power over the conduct of importer-wholesalers and out-of-state shippers of distilled spirits. The Department may revoke or suspend an importer-wholesaler's license if its continuance would be "contrary to public welfare" or if the licensee has been convicted of a public offense involving moral turpitude. CAL. CONST. art. XX, § 22; CAL. BUS. & PROF. CODE §§ 24200(a) and (d). The Department may also revoke or suspend an out-of-state shipper's certificate for cause in the same manner as "provided for the suspension or revocation of a license." *Id.* § 23366.3(b). Therefore, the Department's licensing authority over the conduct of importer-wholesalers and out-of-state shippers gives it ample opportunity to monitor the effect of the Designation Statute and take appropriate action should it determine that the effect in a particular case is contrary to public welfare. This continued oversight by the Department is precisely the type of state supervision which this Court found sufficient to merit application of the state action doctrine in *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

Second, the California Alcoholic Beverage Control Act requires the supervisory agency, the Department of Alco-

holic Beverage Control, to control, monitor and maintain close supervision over the importation and distribution of alcoholic beverages on a continuing basis. *See* CAL. BUS. & PROF. CODE § 23049 *et seq.* and § 25750 *et seq.* (West 1964). If the Designation Statute had been permitted to become effective, the Department would have had an opportunity to monitor and assess the effect of the Statute and issue appropriate supervisory regulations under its authority to "make and prescribe such reasonable rules as may be necessary or proper. . . ." CAL. BUS. & PROF. CODE § 25750 (West 1964); *see also* CAL. CONST. art. XX, § 22.

In fact, prior to the declared effective date of the Designation Statute, the Department had already issued rules which included a requirement that each brand owner who ships distilled spirits into California provide the State with a "written undertaking and agreement" identifying the importer-wholesalers who have been designated and the brands they are authorized to receive. The shipper is required to keep the information current by filing amendments with the Department as changes occur. (P.A. *F* 23-26.) Pursuant to the authority granted to the Department by California Business and Professions Code section 23366.3, the Department's rules also require that the written undertaking and agreement include a provision requiring the shipper to "make available . . . for inspection and copying by the department, all books, documents, and records, located both within and without the state, which are pertinent to the activities of the . . . [shipper] in connection with the sale and distribution of its products within this state." (P.A. *F* 25.)

It cannot be lightly assumed, as the lower court apparently did, that the Department will decline to exert active supervision sufficient to satisfy the second requirement of *Midcal*. In essence, the appellate court's judgment required the impossible, *i.e.*, (1) the enforcement of a supervisory scheme even before the state statute's effective date, and (2) the

adoption of new regulations in advance of an opportunity of the State to determine the need for such regulations in light of the Statute's operation in fact.

Thus, the posture of this case is materially different from that in *Midcal*, in which the state action exemption was held inapplicable. The statutes in issue in *Midcal* were part of a regulatory scheme which had not been re-examined and over which the state had not exercised any control in the *45 years* since its adoption. *See Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal. 3d at 440-41; *California Retail Dealers Assoc. v. Midcal Aluminum, Inc.*, 90 Cal. App. 3d 979, 983, (1979), affirmed in *Midcal*.[23] It is also significant that, unlike in *Midcal*, the Designation Statute has been the subject of recent re-examination by the California Legislature. As previously discussed, after the decision in *Rice*, the Department of Alcoholic Beverage Control took the position that the Designation Statute was unenforceable because of its reference to California Business and Professions Code section 24755, a reference rendered obsolete by *Rice*. After having had the opportunity to consider the *Rice* case and re-examine the Designation Statute, the California Legislature elected to reinstate the Statute's effectiveness by enacting A.B. 499.

Accordingly, even if this Court were to hold that the Designation Statute is otherwise in conflict with the Sherman Act and is not validated by the Twenty-first Amendment, the decision below must be reversed because the Court of Appeal foreclosed the opportunity for the State to utilize its regulatory mechanism to supervise the operation of the Designation Statute.

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[23]Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), the state action exemption was held inapplicable because the Michigan Public Utility Commission had, over many years, passively accepted tariffs filed by the utility.

D. The Commerce Clause Does Not Invalidate the Designation Statute.

The principal issue which the California Court of Appeal expressly addressed in this case was whether the Designation Statute is preempted by the Sherman Act. The court's *sole* reference to the Commerce Clause—an issue not addressed by any of the parties—was a passage in which the court concluded, without citation of authority, that the Statute "is in direct contravention of the express terms of the Commerce Clause and the Sherman Act." 108 Cal. App. 3d at 358. If the court below intended this passing reference to the Commerce Clause as an alternative basis for invalidating the Designation Statute, the ruling betrays a fundamental misunderstanding of the limited nature of the restrictions which the Commerce Clause places on the legislative authority of the states.

In the absence of specific Congressional legislation enacted pursuant to it, the Commerce Clause preempts only state laws which discriminate against interstate commerce in favor of intrastate commerce or which prohibit or unduly restrict the volume of interstate commerce entering or leaving a state. The Commerce Clause does *not* invalidate state laws which do no more than change the structure of the interstate market or which are prohibitive or burdensome only with respect to particular firms engaged in that interstate business. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126-28 (1978); *American Motor Sales Corp. v. Division of Motor Vehicles*, 592 F.2d 219, 223 (4th Cir.), *cert. denied*, 444 U.S. 836 (1979).

For example, in *American Motor Sales Corp. v. Division of Motor Vehicles*, the Court of Appeals for the Fourth Circuit sustained a state statute which limited the number of motor vehicle dealerships for a particular make in a trade area. The court reasoned that the Commerce Clause does not prohibit a state regulation which merely shifts the flow of commerce from one dealership to another or from one

interstate supplier to another. Although the statute precluded the establishment of a competing dealership to sell a make of vehicle, the public could purchase the same vehicles from an existing franchised dealership, or could buy competitive vehicles. 592 F.2d at 223. The court also held that a restriction on intrabrand competition which can withstand scrutiny under the Sherman Act does *not* constitute an impermissible burden on interstate commerce (*id.* at 223-24)—a ruling directly applicable to the facts of this case. Clearly, it cannot be concluded that the Designation Statute, on its face, will bring about a result proscribed by the Commerce Clause. *Compare Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 44, 52 (1966).

The Designation Statute does not violate the Commerce Clause for a second, independent reason. Although the Commerce Clause places restrictions, as discussed above, upon the power of the states to restrict the flow of interstate commerce in most commodities, the Twenty-first Amendment carves out an exception in favor of the states in the field of liquor regulation. *Craig v. Boren*, 429 U.S. 190, 206 (1976). A state may prohibit *all* interstate commerce in distilled spirits. *A fortiori*, a state may, insofar as the Commerce Clause is concerned, determine what commerce may exist and by whom it may be carried on. *State Bd. of Equalization v. Young's Market Co.*, 299 U.S. at 62. Accordingly, it is a well-established principle that the Twenty-first Amendment reserves to the states the power to regulate the importation and distribution of alcoholic beverages "unconfined by traditional Commerce Clause limitations." *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. at 42, quoting *Hostetter v. Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 330 (1964). Applying this principle, courts have rejected challenges on Commerce Clause grounds to state laws analogous to the Designation Statute. *Allstate Beer, Inc. v. Julius Wile Sons & Co., Inc.*, 479 F.Supp. 605, 610 (N.D. Ga. 1979); *Dakota Wholesale Liquor, Inc.*

v. Minnesota, 457 F.Supp. 480, 481-82 (D. Minn.), *aff'd.*, 584 F.2d 847 (8th Cir. 1978) (ruling on motion for preliminary injunction).

Because the Designation Statute does not impermissibly burden interstate commerce and falls squarely within the State's authority under the Twenty-first Amendment, the ruling of the Court of Appeal—to the extent it is based on the Commerce Clause—represents a novel and erroneous interpretation of the constitutional provision and places an unwarranted restriction on the authority of the states to regulate the importation and distribution of distilled spirits.

Conclusion.

Based on the foregoing, it is respectfully submitted that the Judgment below should be reversed.

Respectfully submitted,

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